IN THE SUPREME COURT OF MISSOURI

ROBERT KAPLAN, et al.,	)	
	)	
Plaintiffs/Respondents,	)	
	)	
vs.	)	Appeal No. SC87390
	)	
U.S. BANK, N.A.,	)	
	)	
Defendant/Appellant.	)	

APPEAL FROM ST. CHARLES COUNTY CIRCUIT COURT
THE HONORABLE RONALD R. McKENZIE, JUDGE

SUBSTITUTE BRIEF FOR APPELLANT U.S. BANK, N.A.

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JURISDICTIONAL STATEMENT

Plaintiffs are Robert Kaplan, trustee of the Robert Kaplan Trust, and Doris O'Brien, representative of the estate of Leonard O'Brien, d/b/a Cloverleaf Properties. Defendant U.S. Bank, N.A., ("the Bank") hired Southern Contractors ("Southern") to dispose of concrete containing nonhazardous, trace amounts of polychlorinated biphenyls ("PCBs"). Unbeknownst to the Bank, Southern placed the concrete on Plaintiffs' property without their permission. Plaintiffs sued Southern, the Bank, and others for money damages in St. Charles County Circuit Court. A jury found Southern liable for trespass and negligence, found the Bank liable for Southern's conduct and its own negligence, and awarded punitive damages against them. L.F. 178-79.

On appeal, the Eastern District Court of Appeals reversed the trespass verdict, determining that the Bank could not be held vicariously liable for Southern's conduct. Because it could not determine whether the punitive damages verdict was based on the Bank's conduct or Southern's conduct, the Court reversed and remanded for new trial on the issue of punitive damages. *Kaplan v. U.S. Bank, N.A.,* 166 S.W.3d 60, 66-69, 77 (Mo. Ct. App. 2003) ("*Kaplan I*").

On retrial, the jury awarded $5 million in punitive damages. L.F. 1161. The Bank appealed again. L.F. 1397-1414. In the second appeal, the Court determined, *inter alia*, that the trial court failed to follow the *Kaplan I* opinion and mandate. *Kaplan v. U.S. Bank, N.A.*, 2005 WL 3041002 (Mo. Ct. App. Nov. 15, 2005) ("*Kaplan II*"). This Court accepted Plaintiffs' request for transfer pursuant to Rule 83.04, and reviews the case as though it were before the Court on original appeal. Mo. Const. art. V, §10; Rule 83.09.

INTRODUCTION

This appeal is from errors committed by the trial court on retrial after the first appeal in *Kaplan I*. One of those errors was failure to follow the *Kaplan I* opinion and mandate. The Court of Appeals has now reaffirmed that it meant what it said the first time—that the holding in *Kaplan I* "clearly required" retrial on the *issue* of punitive damages, including both liability and amount. *See Kaplan II*, 2005 WL 3041002 at *4. *See also Kaplan I*, 166 S.W.3d at 77.[1] The trial court erred by removing the subject of liability for punitive damages from the second trial "because that finding was mandated by the holding in *Kaplan I*." *Id.* at *5. In an effort to create a basis for transfer, Plaintiffs attempt to re-create the issue. Plaintiffs cast indictment upon the Court's authority under Rule 84.13(a) to dispose of the appeal as it did in *Kaplan I*. *See* Transf. App. at 1, 5-8. Plaintiffs made no challenge to the Court's authority below (*see* Resp. Brief at 55-56), and may not present it here. *See* Rule 83.08(b). Moreover, the issue under submission in this appeal is whether the trial court departed from the instruction of *Kaplan I*, not the propriety of the instruction itself. *Kaplan I* became final in December, 2003 when the mandate issued. Plaintiffs cannot reach back to challenge what is not now before the Court. In any event, there is no conflict in decisions, no issue of general importance, or indeed any issue at all, regarding Rule 84.13(a) implicated in this case. The appellate

[1] The phrase "liability for punitive damages" refers to a factual finding that the Bank's conduct warranted imposition of punitive damages under the applicable standard. *See* Mo. Rev. Stat. § 510.263.2. *See also* MAI 10.02.

courts of this state plainly are permitted to dispose of appeals as appropriate pursuant to authorities including Rule 84.14. *See Kaplan I*, 166 S.W.3d at 77. Plaintiffs' complaint of the Bank's "waiver" of error otherwise is no more than a red herring.

Plaintiffs' complaints regarding prejudgment interest also are illusory. The trial court awarded $3.2 million in prejudgment interest based on a Notice Of Intent To File Citizen Suit that Plaintiffs sent as a statutory prerequisite to the federal environmental lawsuit they originally filed. Plaintiffs announced their intent to sue. They did not make a demand for payment (or offer of settlement) at all, must less a demand (or offer) that was quantifiable as an ascertainable amount. The Court of Appeals' determination that Plaintiffs did not meet the requirements of Mo. Rev. Stat. § 408.040.2 is fully consistent with, and indeed required by, this Court's decisions interpreting that statute, including *Brown v. Donham*, 900 S.W.2d 630 (Mo. banc 1995).

Plaintiffs' attempts to craft a basis for transfer are no more than creative misdirection. This Court can and should retransfer this case to the Court of Appeals. *See* Rule 83.09. Should the Court retain this case, however, it should reverse the trial court's erroneous judgment. The trial court's instructional error not only removed from the jury the mandated question whether the Bank's negligence warranted punitive damages, but fatally skewed the jury's determination of the only question presented—the amount of punitive damages. The court incorrectly told the jury that the Bank's liability for punitive damages already was established, and to assume that the Bank's conduct was equivalent to intentional wrongdoing and showed complete indifference to Plaintiffs' rights. The court then repeatedly refused to allow the Bank to present mitigating evidence because

the evidence was inconsistent with that mistaken assumption. It also permitted Plaintiffs to argue that substantial punitive damages were necessary to punish the Bank for relitigating its liability for those damages. The result was a one-sided trial, in which the jury was instructed to award punitive damages but was not allowed to consider what the Bank actually did.

That flawed process resulted in a grossly excessive award. The jury awarded $5 million in punitive damages based on the Bank's negligence in monitoring Southern's disposal of waste concrete. But the Bank believed that Southern, which had a contractual duty to properly dispose of the concrete, had taken it to a landfill. The concrete was not hazardous under state or federal law, and Plaintiffs' only injury was the cost of removing it from their property, for which they have been fully compensated. The Bank's conduct simply cannot justify the enormous punitive damages verdict in this case.

STATEMENT OF FACTS

I. Factual Background.

A. The Lackland Road Property.

From 1976 to 1993, Gusdorf Corporation ("Gusdorf") operated a furniture manufacturing plant on property on Lackland Road in St. Louis County. Pls' Ex. 78 at 7, 10-11; 2 Tr. 97.[2] As Gusdorf's principal lender, the Bank held a security interest in that property. 3 Tr. 133.

In 1992, Gusdorf defaulted on its loan from the Bank. 6 Tr. 25. In 1993, Gusdorf ceased operations and closed the Lackland Road plant. 3 Tr. 19. Gusdorf continued in existence in order to allow its corporate representatives to wind up the business. 7 Tr. 22-27. It was dissolved in 1997. L.F. 38.

In the meantime, the Bank discovered that the Lackland Road property was contaminated with PCBs. A previous owner, Cooper Industries ("Cooper"), had used PCBs in its operations on the site. Pls' Ex. 78 at 1. Trace levels of PCBs are ubiquitous and nonhazardous, but significant concentrations can pose environmental risks. 8 Tr. 48, 67. The United States Environmental Protection Agency ("EPA") and the Missouri Department of Natural Resources ("DNR") have set standards for permissible levels of PCBs. Under those standards, concrete containing PCBs in concentrations of less than 10 parts per million ("ppm") is nonhazardous. 8 Tr. 154.

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[2] Citations to the trial transcript follow the form "[volume] Tr. [page number]."

The Bank hired consultants to assess the PCB contamination on the property. 7 Tr. 11. One consultant, Steven Sweet from Abatement Management Inc. ("AMI"), found extensive PCB contamination at the site. 7 Tr. 16; Pls' Ex. 73 at 19. The Bank decided to remediate the property to bring it into compliance with state and federal law before foreclosing on and selling it. 6 Tr. 26-28; 7 Tr. 13.

B. Remediation of the Lackland Road Property.

The Bank asked Cooper to assume primary responsibility for the cleanup because it had introduced the PCBs onto the site. 6 Tr. 45. At that point, Gusdorf still owned the site, although it was dependent on the Bank for financial support. 3 Tr. 22-24.

In October 1994, Gusdorf and Cooper entered into a settlement in which Cooper agreed to remediate the property. Pls' Ex. 69. The Bank was designated a beneficiary of that agreement. *Id.* at 1. Under the agreement, structures on the property would be demolished, with Cooper paying 75% of the demolition costs, and the Bank and Gusdorf paying the remainder. *Id.* at 4. Cooper was responsible for removal of all waste material containing more than 10 ppm of PCBs. *Id.* at 1. Remediation of any material containing less than 10 ppm – which was not required under state or federal law – was the responsibility of Gusdorf and the Bank. 6 Tr. 80.

The agreement was accompanied by an environmental work plan. 3 Tr. 101; Pls' Ex. 78. The work plan required disposal of wastes containing more than 10 ppm of PCBs at a landfill. Pls' Ex. 78 at 13-14. Materials with under 10 ppm of PCBs could be used onsite as backfill or taken off the property and disposed of at a landfill. *Id.* at 14, 27. The EPA approved the work plan. Pls' Ex. 94.

The cleanup effort involved numerous contractors and consultants. 5 Tr. 6-9; 7 Tr. 11. AMI was hired to monitor the remediation activities. 7 Tr. 33. Southern was hired as the demolition contractor. 7 Tr. 18, 43. By late 1995, Cooper had removed all materials with PCBs in excess of 10 ppm. 7 Tr. 21, 40. In July 1996, the EPA approved the cleanup. Def's Ex. M619.

At that point, it was still necessary to complete demolition of some structures and to dispose of the remaining waste concrete, which contained less than 10 ppm of PCBs. In January 1996, Gusdorf and Southern entered into a contract addressing that work. Def's Ex. M616. Southern was to complete the demolition and "properly dispose[]" of any material taken offsite. *Id.* at 4, App. B. Southern was also required to maintain liability insurance and to provide indemnification for any claims arising from the work. *Id.* at 3, 4, App. F.

Although waste concrete with less than 10 ppm could remain onsite, the Bank decided it should be removed. 6 Tr. 91. Gusdorf and Southern executed a change order to their contract which required Southern to dispose of all contaminated concrete at a landfill. Pls' Ex. 171.

C. Deposit of Concrete in Plaintiffs' Ditch.

In 1996, Leonard Werre, a nearby homeowner, approached Southern's principal, Gerald Winter, and inquired about the availability of the waste concrete. 7 Tr. 164; 8 Tr. 11. A ditch behind Werre's home had been widening due to erosion. 8 Tr. 8. In 1995, the City of St. Charles had tried to stem the erosion by partially filling the ditch with concrete. 8 Tr. 9-10, 30-31. Werre, who believed that the ditch was on his property,

asked Winter to use concrete from the Lackland Road site to fill the remainder of the ditch, and Winter agreed. 7 Tr. 164. Two of Werre's neighbors later joined in the request. 7 Tr. 168. Werre verified with the City that no permit was needed to deposit the concrete in the ditch. 8 Tr. 12.

In July and August 1996, Winter hauled 5900 tons of concrete to the ditch. 7 Tr. 169-70; Pls' Ex. 180. Winter did not tell Karen Myers, the Bank official responsible for the remediation of the Lackland Road property, 6 Tr. 11, where he was taking the concrete, and Myers assumed he was taking it to a landfill, 7 Tr. 47, 54, 103. Winter kept records of the deposits, but Myers did not receive them until September 1996. 7 Tr. 55-56. The records stated only that the concrete had been taken to "9 Faye Avenue," and, at that time, Myers did not know the nature of that property. *Id.*

It turned out that Plaintiffs owned part of the ditch, and they had not given Winter permission to deposit the concrete. Plaintiffs discovered the concrete in December 1996, when a culvert that emptied into the ditch became clogged and caused flooding on their property, a mobile home park on the other side of the ditch. 9 Tr. 17-19. The Bank did not learn that the concrete had been deposited in the ditch until January 1997. 4 Tr. 94; 6 Tr. 164.

D. Cleanup of the Ditch.

In January 1997, Kaplan scheduled a meeting with Southern and the Bank to discuss the situation. Myers was unable to attend because she was ill, but Winter attended for Southern. 6 Tr. 165; 9 Tr. 33. Kaplan demanded that Winter pay to test the concrete and remove it from the ditch. 9 Tr. 33; Pls' Ex. 207. Winter assured Kaplan

that the concrete was nonhazardous, but promised to test and remove it. 9 Tr. 34-35, 110; Pls' Ex. 209, 216, 221.

In April 1997, Winter arranged for tests of the concrete and the surrounding soil and water. The tests detected no PCBs in the water, and concentrations of less than 1 ppm in the soil samples and all but one of the concrete samples. Pls' Ex. 227 at 7-8. That concrete sample had a concentration of 4.14 ppm, still well below the 10 ppm threshold to qualify as hazardous. *Id.*

In June 1997, Plaintiffs requested a meeting with the Bank to discuss removing the concrete. 9 Tr. 49-52. Until then, Plaintiffs had copied the Bank on their correspondence but had made no formal demand on the Bank. 9 Tr. 112-13. Myers therefore believed that Winter was taking care of the problem. 6 Tr. 173; 7 Tr. 62.

At the meeting, Plaintiffs told the Bank's representative that they wanted the Bank to remove the concrete, dispose of it properly, and test the area for PCB contamination. 4 Tr. 41-44. Plaintiffs also requested that Southern and the Bank indemnify them from liability and pay their out-of-pocket expenses, and that the homeowners, Southern, and the Bank release Plaintiffs from any liability. *Id.* The Bank requested additional information from Plaintiffs. 4 Tr. 48, 51. Although it believed that Southern should and would take responsibility for removing the concrete, the Bank offered to help pay for the cleanup. 4 Tr. 58-59, 95, 99.

As Plaintiffs stipulated at trial, the low PCB levels in the concrete made it nonhazardous under state and federal law. L.F. 1127. Its presence in the ditch, however, concerned the DNR because the ditch was a drainage way. 8 Tr. 70. The drainage way

did not support any aquatic life because it did not have a constant flow of water. *Id.* The DNR sent notices of Missouri Clean Water Law violations to Werre and the other homeowners. 7 Tr. 188-93. No notices were directed to the Bank, although it was copied on the notices to the homeowners. 8 Tr. 23-25; Pls' Ex. 251, 253.

In June 1999, Plaintiffs agreed to lease their property to Lowe's Home Improvement Warehouse. 9 Tr. 78-79. In conjunction with the lease, Plaintiffs agreed to clean up the ditch. 9 Tr. 82. Plaintiffs hired an environmental consulting firm to develop a remediation plan. 9 Tr. 86.

In August 1999, the Bank sent Plaintiffs a proposal, drafted by the Bank's environmental consultant, under which the Bank offered to clean up the ditch at no cost to Plaintiffs. 4 Tr. 58-71; Pls' Ex. 286. That proposal was not conditioned on Plaintiffs' agreeing not to pursue this lawsuit. Pls' Ex. 286 at 1. The Bank put $250,000 in escrow to fund the cleanup. *Id.* at 2. Plaintiffs nonetheless rejected the Bank's proposal. 9 Tr. 88-91; Pls' Ex. 298.

In November 1999, Plaintiffs remediated the creek using their own plan. 8 Tr. 137-40. They removed the concrete and other surrounding materials and filled in the ditch. 7 Tr. 197-99. In July 2000, Plaintiffs obtained a "no further action" letter from the DNR. Pls' Ex. 334.

II. Procedural Background.

A. First Trial.

In October 1998, Plaintiffs filed suit, seeking compensatory and punitive damages against the Bank, Gusdorf, Southern, Winter, Werre, and the other homeowners. L.F. 2,

37-58. Plaintiffs settled with the homeowners before trial, 8 Tr. 23, and dismissed their claims against Gusdorf at the close of the evidence, L.F. 312.

The court submitted the case against Winter and Southern to the jury on negligence and trespass. L.F. 113-18. The court also submitted claims for punitive damages against them. L.F. 129-30, 132-35.

The court submitted the case against the Bank on two theories: first, that the Bank was vicariously liable for Southern's trespass and negligence, L.F. 119-24; second, that the Bank was itself negligent in failing to ensure disposal of the concrete at a landfill as required by the work plan, L.F. 125-26. The court submitted claims for punitive damages against the Bank based both on the Bank's vicarious liability for Southern's trespass and on the Bank's direct negligence. L.F. 129, 131, 133, 136.

The jury returned a verdict in favor of Plaintiffs and awarded $650,000 in compensatory damages. L.F. 178-79. It determined that Southern was 20% responsible for those damages and that the Bank was 80% responsible. *Id.* The jury also awarded punitive damages against both Southern and the Bank. L.F. 179.

B. First Appeal.

The Bank appealed. It argued that it could not be held vicariously liable for Southern's conduct because Southern was not its agent. The Court agreed. *See Kaplan I*, 166 S.W.3d at 66-69. The trespass verdict thus set aside, Plaintiffs could not recover either actual or punitive damages on that claim. *Id.* at 77. As to Plaintiffs' direct negligence claim, the Court rejected the Bank's argument that it had no duty to Plaintiffs under the work plan, upholding the Bank's liability for compensatory damages. *Id.* at 69-

71, 77. The Court also determined that Plaintiffs made a submissible case for punitive damages on that claim. *Id.* at 74. It could not, however, determine whether the jury's punitive damages verdict was based on the *permissible* theory that the Bank was itself negligent or on the *impermissible* theory that it was vicariously liable for Southern's trespass. *Id.* at 77. The Court therefore remanded for a new trial "on the issue of punitive damages" and "directed" the trial court "at the new trial to submit the issue of punitive damages against the Bank on its direct negligence." *Id.*[3]

C. Second Trial.

On retrial, however, the trial court refused to submit whether punitive damages should be awarded against the Bank for its direct negligence. Instead, it instructed the jury that "[a] previous jury and the Missouri Court of Appeals ha[d] already decided" that the Bank's "conduct was the equivalent of intentional wrongdoing and showed complete indifference to and conscious disregard for Plaintiffs' rights," and the jury had to "accept" those findings "as true." L.F. 1132. The jury was therefore only "to decide the amount" of the punitive damages to award. *Id.*; *see also* L.F. 1160.

Throughout the trial, Plaintiffs repeatedly relied on these instructions to argue that a large punitive damages award was necessary to punish the Bank for continuing to dispute its liability for punitive damages. 2 Tr. 24-26; 10 Tr. 7-8, 39-40. The trial court

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[3] The Bank sought review from this Court, which sustained the transfer application, but then retransferred back to the Court of Appeals, which reinstated its opinion by mandate issued in December, 2003. L.F. 278-79.

also repeatedly relied on its determination that liability for punitive damages had been established as grounds for rejecting the Bank's mitigating evidence. 3 Tr. 119; 5 Tr. 115; 8 Tr. 73-74.

The jury awarded $5 million in punitive damages. L.F. 1161. Plaintiffs also sought and were awarded prejudgment interest on both the compensatory and punitive damages verdicts in the amount of $3.2 million. L.F. 1162, 1307. On December 15, 2004, the trial court denied the Bank's post-trial motions. L.F. 1384-85. On December 23, 2004, the Bank filed a timely notice of appeal. L.F. 1397-1414.

D. Second Appeal.

The Bank raised various issues on appeal from the second trial, including the trial court's failure to follow the opinion and mandate in *Kaplan I*. *See* App. Br. at 27-36. The Court of Appeals agreed, stating that "the mandate of *Kaplan I* clearly required a new trial on the 'issue of punitive damages,' including a finding of liability for punitive damages and an amount, if any." *Kaplan II*, 2005 WL 3041002 at *4. By removing the issue of liability from the second trial, the trial court erred "because that finding was mandated by the holding in *Kaplan I*." *Id.* at *5. The Court rejected Plaintiffs' argument (*see* Resp. Br. at 55-56) that the Bank "waived" its challenge to "liability" for punitive damages because it challenged submissibility but not weight of the evidence in *Kaplan I*. *See id.* at *3 n.5. Below, Plaintiffs said the Court "had no obligation in the first appeal (or now)" to address the liability issue. *Id.* at 60. Plaintiffs never questioned the Court's authority under Rule 84.13(a) or otherwise.

The Court also addressed the subject of prejudgment interest, finding that Plaintiffs' 1997 notice of intent to file suit was neither a "demand for payment" nor an "offer of settlement" as required by Section 408.040.2, and otherwise was not sufficiently definite as required by *Brown v. Donham*, 900 S.W.2d 630 (Mo. banc 1995). *Kaplan II*, 2005 WL 3041002 at *5-7.

E. Plaintiffs' Transfer Application.

Plaintiffs filed an application for transfer with the Court of Appeals, which was denied on December 22, 2005, and thereafter sought transfer by this Court pursuant to Rule 83.04. As grounds for transfer, Plaintiffs assert for the first time in this litigation that the Court of Appeals had no "ability" under Rule 84.13(a) to remand with the instructions it gave in *Kaplan I*, and identify no basis under Rule 83.02 (general interest or importance of a question involved in the case or to re-examine existing law) or Rule 83.04 (opinion contrary to a previous decision of an appellate court) warranting this Court's review. Transf. App. at 1. As to prejudgment interest, Plaintiffs assert that *Kaplan II* "adds new requirements" to Section 408.040.2 in "conflict" with *Brown v. Donham* and *Lester v. Sayles*. Transf. App. at 1.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GIVING JURY INSTRUCTIONS 2 AND 7 BECAUSE THOSE INSTRUCTIONS CONTRAVENED THE *KAPLAN I* OPINION AND MANDATE ORDERING A NEW TRIAL ON THE ISSUE OF PUNITIVE DAMAGES, IN THAT THE INSTRUCTIONS TOOK FROM THE JURY THE QUESTION OF THE BANK'S LIABILITY FOR PUNITIVE DAMAGES AND SKEWED THE JURY'S DETERMINATION OF AMOUNT.

MAI 10.02

Kaplan v. U.S. Bank, N.A., 166 S.W.3d 60 (Mo. Ct. App. 2003)

Edmison v. Clarke, 61 S.W.3d 302 (Mo. Ct. App. 2001)

Williams Carver Co. v. Poos Bros., Inc., 778 S.W.2d 684 (Mo. Ct. App. 1989)

II. THE TRIAL COURT ERRED IN REFUSING TO REMIT THE PUNITIVE DAMAGES AWARD BECAUSE THAT AWARD IS EXCESSIVE UNDER MISSOURI LAW, IN THAT THE BANK'S NEGLIGENCE WAS NOT MALICIOUS OR REPEATED, THE HARM TO PLAINTIFFS OCCURRED BECAUSE OF THE NEGLIGENCE OF OTHERS, AND THE BANK DID NOT KNOWINGLY VIOLATE A RULE DESIGNED TO PREVENT THE HARM.

Mo. Rev. Stat. § 510.263

Werremeyer v. K.C. Auto Salvage Co., 134 S.W.3d 633 (Mo. banc 2004)

Call v. Heard, 925 S.W.2d 840 (Mo. banc 1996)

III. THE TRIAL COURT ERRED IN REFUSING TO REMIT THE PUNITIVE DAMAGES AWARD BECAUSE THAT AWARD VIOLATES DUE PROCESS, IN THAT THE BANK'S CONDUCT WAS NOT REPREHENSIBLE, THE RATIO OF PUNITIVE TO ACTUAL DAMAGES EXCEEDS 11 TO 1, THE AWARD DWARFS ANY COMPARABLE STATUTORY PENALTIES, AND THE AWARD IS BASED ON CONDUCT THAT DID NOT HARM PLAINTIFFS.

U.S. Const. amend. XIV

State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003)

BMW of N. Am. v. Gore, 517 U.S. 559 (1996)

Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594 (8th Cir. 2005)

IV. THE TRIAL COURT ERRED IN AWARDING PREJUDGMENT INTEREST BECAUSE PLAINTIFFS DID NOT MEET THE REQUIREMENTS OF MO. REV. STAT. § 408.040.2 AND OTHER APPLICABLE MISSOURI LAW, IN THAT THEY DID NOT MAKE AN OFFER OF SETTLEMENT OR DEMAND FOR PAYMENT, ANY DEMAND WAS INSUFFICIENTLY DEFINITE, AND THEIR MOTION FOR PREJUDGMENT INTEREST WAS UNTIMELY.

Mo. Rev. Stat. § 408.040.2 (2000)

Mo. S. Ct. Rule 75.01

Mo. S. Ct. Rule 78.04

Mo. S. Ct. Rule 81.05

Emery v. Wal-Mart Stores, 976 S.W.2d 439 (Mo. banc 1998)

Brown v. Dorham, 900 S.W.2d 630 (Mo. banc 1995)

V. THE TRIAL COURT ERRED IN AWARDING PREJUDGMENT INTEREST BECAUSE THE RULE ANNOUNCED IN *WERREMEYER*, WHICH PERMITS PREJUDGMENT INTEREST ON PUNITIVE DAMAGES, SHOULD NOT BE APPLIED RETROACTIVELY, IN THAT THE RULE DEPARTED FROM CLEAR PAST PRECEDENT, RETROACTIVE APPLICATION WOULD NOT FURTHER THE RULE'S PURPOSES, AND THE BALANCE OF INTERESTS FAVORS ONLY PROSPECTIVE APPLICATION.

Trans UCU, Inc. v. Dir. of Revenue, 808 S.W.2d 374 (Mo. banc 1991)

Sumners v. Sumners, 701 S.W.2d 720 (Mo. banc 1985)

ARGUMENT

I. THE TRIAL COURT ERRED IN GIVING JURY INSTRUCTIONS 2 AND 7 BECAUSE THOSE INSTRUCTIONS CONTRAVENED THE *KAPLAN I* OPINION AND MANDATE ORDERING A NEW TRIAL ON THE ISSUE OF PUNITIVE DAMAGES, IN THAT THE INSTRUCTIONS TOOK FROM THE JURY THE QUESTION OF THE BANK'S LIABILITY FOR PUNITIVE DAMAGES AND SKEWED THE JURY'S DETERMINATION OF AMOUNT.

In *Kaplan I*, the Court of Appeals directed the trial court to hold a new trial on "the issue of punitive damages." 166 S.W.3d at 77. But the trial court did not do that. Instead, it instructed the jury that the Bank had *already* been found liable for punitive damages and that the jury's *only* task was to decide the amount of damages to award. By taking from the jury the preliminary question whether the Bank should be held liable for punitive damages at all, the trial court fundamentally departed from the opinion and instruction of *Kaplan I*. *See Kaplan II*, 2005 WL 3041002 at *4-5.

As a result, the Bank *never* received a determination – by *any* finder of fact – that its negligence justified punitive damages. Moreover, the trial court's error infected the entire second trial and deprived the Bank of a fair determination of the amount of damages. The punitive damages award produced by that flawed process cannot stand.

Standard of Review.

This Court reviews *de novo* whether the trial court complied with the appellate court mandate. *See Jones v. United States*, 255 F.3d 507, 510 (8th Cir. 2001); *Hankins v.*

Hankins, 864 S.W.2d 351, 353 (Mo. Ct. App. 1993). To the extent the trial court's misunderstanding of the mandate manifested itself in the jury instructions, the legal sufficiency of those instructions is reviewed *de novo*. *See Mehrer v. Diagnostic Imaging Ctr., P.C.*, 157 S.W.3d 315, 323 (Mo. Ct. App. 2005).

A. In *Kaplan I*, The Court Instructed The Trial Court To Hold A New Trial On The Issue Of Punitive Damages, Including A Determination Of The Bank's Liability For Those Damages.

In *Kaplan I*, the Bank challenged both its underlying tort liability and its liability for punitive damages. The Court first considered the Bank's underlying liability, which the jury had based on both the Bank's negligence and Southern's trespass and negligence. L.F. 178-79. The Court determined that the Bank could not be held vicariously liable for Southern's conduct, because Southern was not the Bank's agent. *See* 166 S.W.3d at 66-69. Thus, Plaintiffs could not recover either actual or punitive damages on that claim. *Id.* at 77. But the Court determined that the Bank could be held liable for its own negligence in failing to comply with the work plan, upholding the compensatory damages award. *See id.* at 69-71, 77.

The Court next considered the Bank's challenge to punitive damages. The Court explained that whether a plaintiff has made a submissible case of punitive damages on a negligence claim is "a question of law" that turns on whether "a reasonable juror could have found" that the defendant "showed complete indifference to or conscious disregard for the rights of others." *Id.* at 73-74. "[V]iew[ing] the evidence and all reasonable inferences drawn therefrom in the light most favorably to the plaintiff[s]," the Court

concluded that "[t]he evidence supported submission of the punitive damages claim against the Bank on the negligence claim." *Id.* at 73, 74.

Although the Court concluded that Plaintiffs' negligence-based punitive damages claim was submissible, it could not affirm the punitive damages verdict because there was no way to tell whether it was based on Southern's trespass or the Bank's negligence. "The jury was . . . given only one place on the verdict form to enter an amount of punitive damages for each defendant based on a finding of liability on either trespass or negligence." *Id.* at 77. The Court could not "determine from the jury's verdict what, if any, of the $7 million in punitive damages was based on the Bank's vicarious liability for trespass and what part, if any, of the award was based on the Bank's direct liability for negligence." *Id.* Consequently, the Court decided it must "reverse[]" the punitive damages award and "remand[] for a new trial only on the issue of punitive damages." *Id.; see also* L.F. 278 (mandate). The Court "directed" the trial court "at the new trial to submit the issue of punitive damages against the Bank on its direct negligence." 166 S.W.3d at 77. The Court's direction could not have been more clear. The remand for new trial "clearly required" submission of the Bank's liability for punitive damages on the direct negligence claim before reaching the question of amount. *Kaplan II*, 2005 WL 3041002 at *4-5.

B. The Trial Court Took The Issue Of Liability For Punitive Damages From The Jury And Thus Disregarded The Court's Mandate.

The trial court did just the opposite of what *Kaplan I* directed. It refused to submit whether the Bank should be held liable for punitive damages, but instead instructed that

the Bank's liability had *already been established*. The jury was told to assume liability and find only amount. This manifest failure to follow the *Kaplan I* mandate was reversible error.

Instructions 2 and 7 were proposed by Plaintiffs and given by the trial court over the Bank's objections. *See* L.F. 1047, 1053, 1055-61, 1132, 1160, 1076-77, 1091; 2 Tr. 4, 9, 11. Instruction 2 provided:

> As the Court will instruct you at the end of this case, you will be asked to decide only the amount, if any, of punitive damages that should be awarded against Defendant U.S. Bank. A previous jury and the Missouri Court of Appeals has already decided that
>
> 1. 5900 tons of concrete containing a chemical compound known as polychlorinated biphenyls, or PCBs, were deposited into a creek owned by Plaintiffs.
>
> 2. Defendant U.S. Bank violated an environmental Work Plan and was therefore negligent by failing to properly dispose of the concrete at a landfill or at the Gusdorf site.
>
> 3. Southern Contractors, who deposited the concrete in the Plaintiffs' creek was also negligent.
>
> 4. Southern Contractors was not the agent of U.S. Bank and the Bank was not liable for the conduct of Southern Contractors.
>
> 5. U.S. Bank was 80% at fault and Southern Contractors was 20% at fault.

6. Plaintiffs were awarded their clean up costs, $650,000, as their actual or compensatory damages.

7. Defendant U.S. Bank's conduct was the equivalent of intentional wrongdoing and showed complete indifference to and conscious disregard for Plaintiffs' rights.

For the purposes of this trial, therefore, you should not question these findings but must accept them as true.

Under Missouri law, plaintiffs have established all of the preconditions to an award of punitive damages. Your duty is to decide the amount, if any, of punitive damages that should be awarded against Defendant U.S. Bank.

L.F. 1155. Instruction 7 stated: "In addition to the compensatory damages already awarded to Plaintiffs, you may award Plaintiffs an additional amount as punitive damages in such sum as you believe will serve to punish U.S. Bank and deter U.S. Bank and others from like conduct." L.F. 1160.

These instructions reflected a serious misunderstanding of the *Kaplan I* decision. Instruction 2 stated that "[a] previous jury and the Missouri Court of Appeals has already decided that" the Bank's conduct "was the equivalent of intentional wrongdoing and showed complete indifference to and conscious disregard for Plaintiffs' rights." L.F. 1155. The instruction thus embodied the belief that, in *Kaplan I*, the Court had "affirmed" the prior jury's finding of "the elements necessary to prove liability for punitive damages" (1 Tr. 87) or itself made such a finding. Not so. In *Kaplan I*, the

Court *reversed* the first jury's punitive damages verdict, and did so for the reason that it could *not* determine whether that verdict was based on a permissible theory of negligence or an impermissible theory of trespass. 166 S.W.3d at 77. Of course, the Court did not itself make any finding of liability for punitive damages; rather, it held only that Plaintiffs could properly submit that issue to the jury. *Id.* at 74-75.

At the second trial, Plaintiffs insisted that "[a] submissible case and liability" are "one [and] the same." 1 Tr. 82, 85. The trial court accepted this argument, as reflected in the instructions. *Id.*; L.F. 1155. Plaintiffs and the trial court fundamentally confused *Kaplan I*'s holding of submissibility with a jury's finding of liability. Submissibility is a question of law, determined by a court, addressing what a reasonable jury, viewing the evidence in the light most favorable to the plaintiff, *could* or would be *permitted* to find. *See McGuire v. Tarmac Envtl. Co.*, 293 F.3d 437, 441-42 (8th Cir. 2002). Liability is a question of fact, determined by the jury, addressing whether punitive damages actually *should* be awarded, or are *warranted* under the applicable standard. *See* Mo. Rev. Stat. § 510.263.2 (distinguishing between submissibility and liability). In *Kaplan I*, the Court held only that Plaintiffs' claim for punitive damages was *submissible*—not that the Bank was *liable* for punitive damages. *See* 166 S.W.3d at 74 (Court addressed "only the contention that there was no evidence to support submission of punitive damages against the Bank for its negligence").[4]

[4] In their motion for transfer, Plaintiffs suggest that by distinguishing between submissibility of, and liability for, punitive damages, the Bank somehow conceded that

On retrial, the trial court told the jury to presume what *Kaplan I* had expressly held could *not* be presumed – that the first jury had actually determined that punitive damages were warranted for the Bank's negligence. The trial court told the jury to "accept . . . as true" purported findings by the prior jury and the Court that the Bank was liable for punitive damages. L.F. 1155. The trial court further instructed the jury that it "should not question" those supposed "findings" but should "decide only the amount" of punitive damages to award. *Id.* Instead of giving MAI 10.02, the trial court gave Plaintiffs' Instruction 7, which bypassed any requirement that the jury find complete indifference or conscious disregard, and told the jury to simply choose an amount.

Pure and simple, the trial court violated *Kaplan I*'s clear instruction to submit to the jury the question whether the Bank's direct negligence, standing alone, warranted punitive damages, *Kaplan II*, 2005 WL 3041002 at *4-5, and erroneously modified MAI 10.02 to remove that issue by "adding, subtracting, or substituting words or phrases." *Clark v. Mo. & N. Ark. R.R. Co.*, 157 S.W.3d 665, 673 (Mo. Ct. App. 2004).

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by challenging only submissibility in *Kaplan I*, it waived the issue of liability. *See* Transf. App. at 1, 4, 8. This is ridiculous. By challenging submissibility, the Bank obviously contested its liability for punitive damages. *See Kaplan I*, 166 S.W.3d at 74. The lack of submissibility (for want of sufficient evidence to even present to the jury) necessarily means no liability. The reverse, however, is not true—an appellate court's legal determination of submissibility does not necessarily mean the jury is required to find liability, as Plaintiffs argued before the trial court.

C. The Court's Instructions Comport With Missouri Substantive Law And Procedure.

The Court's instructions in *Kaplan I* were fully consistent with Missouri substantive law and procedure. Substantively, a defendant's liability for punitive damages may be based only on conduct for which it has properly been found liable for compensatory damages. *See Williams Carver Co. v. Poos Bros., Inc.*, 778 S.W.2d 684, 686 (Mo. Ct. App. 1989); *see also* 1 John J. Kircher & Christine M. Wiseman, *Punitive Damages: Law and Practice* § 5:21, at 5-141 (2d ed. 2000). Further, punitive damages do not follow automatically from an award of compensatory damages. *See Vaughn v. Taft Broad. Co.*, 708 S.W.2d 656, 660 (Mo. banc 1986). Thus, after a defendant is found liable for compensatory damages, a jury is required to make a separate factual finding of liability for punitive damages, considering only the conduct that gave rise to compensatory damages. *See* 1 Kircher & Wiseman, *supra*, § 5:23, at 5-152.

When a trial court instructs a jury that it may find a defendant liable on multiple theories, one of which is later found erroneous, and the jury returns a general verdict that does not indicate on which theory it based liability, the verdict cannot stand. *See Slater v. KFC Corp.*, 621 F.2d 932, 938 (8th Cir. 1980); *Whitehead v. Fogelman*, 44 S.W.2d 261, 263 (Mo. Ct. App. 1931). Here, the first jury returned a general punitive damages verdict that did not disclose whether it was based on the permissible theory that the Bank was itself negligent, or the impermissible theory that it was vicariously liable for

Southern's conduct.[5] Having held the Bank not liable for Southern's conduct and being unable to determine a finding of liability and amount, if any, based on direct negligence, the Court reversed and remanded with direction that a new trial be held on these subjects. *Kaplan I*, 166 S.W.3d at 77; *Kaplan II*, 2005 WL 3041002 at *4-5. The Court was fully within its procedural authority to do so.

Plaintiffs' transfer application mutates their position below that the Court was not *obligated* to address the "liability" issue into a position that it had no procedural *authority* to do so under Rule 84.13(a). *Compare* Resp. Br. at 60 *with* Transf. App. at 5. Plaintiffs did not present this challenge below, and may not present it before this Court. *See* Rule 83.08(b); *Linzenni v. Hoffman*, 937 S.W.2d 723, 726-27 (Mo. banc 1997). Moreover, the issue under submission in this appeal is whether the trial court departed from the instruction of *Kaplan I*, not the Court of Appeals' authority to give that instruction. The judgment in *Kaplan I* became final in December, 2003 when the mandate issued. *See Owens v. Unified Investigators & Sciences, Inc.*, 166 S.W.3d 89, 92 n.1 (Mo. Ct. App. 2005)(recounting procedural history of *Kaplan I*). Regardless of Plaintiffs' arguments, the trial court had no authority to deviate from the instruction given, which it plainly did. *See Kaplan II,* 2005 WL 3041002 at *5; *Edmison v. Clarke*, 61 S.W.3d 302, 310 (Mo. Ct.

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[5] These two potential bases for punitive damages cannot be conflated. The standards for awarding punitive damages based on an intentional tort (e.g., trespass) and negligence are different. *Compare* MAI 10.01 (intentional tort) *with* MAI 10.02 (negligence).

App. 2001); *Boillot v. Conyer*, 887 S.W.2d 761, 763 (Mo. Ct. App. 1994). "Any proceedings in the trial court contrary to the mandate are null and void." *Edmison*, 61 S.W.3d at 310 (internal quotation marks omitted).[6] At this juncture, Plaintiffs cannot reach back in time to attack the Court's ability to do what it did in *Kaplan I*—a challenge never raised in connection with the first appeal, or addressed to the Court of Appeals in the second appeal.

In any event, Plaintiffs' apparent attempt to limit the Court's authority via Rule 84.13(a) is wholly misplaced for multiple reasons: Rule 84.13(a) does not apply; Rule 84.13 itself allows for review of unpreserved "plain error;" and the appellate courts of this state otherwise are empowered to dispose of appeals in the manner appropriate pursuant to Rule 84.14.

Plaintiffs contend that the Bank waived the issue of liability for punitive damages because, in *Kaplan I*, it challenged submissibility but not weight of the evidence. *See* Resp. Br. at 55-56. This argument is a red herring. In the first appeal, the Bank unquestionably preserved and presented the issue whether it could be held vicariously liable for Southern's conduct. S.L.F. 14-15, 17-18, 20, 23-24, 26-27, 29. The Bank prevailed on this issue. The Court determined that the Bank could not be held vicariously

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[6] The trial court's departure from the mandate not only exceeded its authority, but deprived the Bank of an important right under Missouri law: to have a fact-finder determine whether it should be held liable for punitive damages based only on its direct negligence. *See, e.g., Saunders v. Flippo*, 639 S.W.2d 411, 412 (Mo. Ct. App. 1982).

liable for Southern's trespass, *Id.* at 66-69, and as a consequence, could not be liable for punitive damages on that theory. *Id.* at 77. Thus, the Court reversed the punitive damages verdict and remanded for a new trial on punitive damages considering only the Bank's negligence. *Id.* Because the Court *reversed* on *that* basis, it is irrelevant that the Bank did not challenge the verdict on the *separate* basis as being against the weight of the evidence. In addition, and just as the taint of trespass could not be removed, a finding as to negligence could not be presumed. The question whether such a finding—had one been made—was unsupported by the weight of the evidence would have added nothing but a hypothetical inquiry, presenting nothing for the Court to review. Challenge to weight of the evidence was extraneous, and Rule 84.13(a) simply does not apply.

Plaintiffs' related argument (Resp. Br. at 56-59) that the Bank should have separately challenged the verdict form likewise misses the mark. The Bank has never asserted that the verdict form was itself improper, but urged that if one of the multiple theories on which punitive damages was submitted was deemed improper, a new trial would be required. *See* S.L.F. 20. This also was the reasoning of the Court of Appeals, the question being one of disposition upon the findings ultimately made. *See Kaplan I*, 166 S.W.3d at 77. The Bank was not required to mount a separate challenge to the verdict form in order to argue now that the trial court did not follow the Court of Appeals' instruction in *Kaplan I*.

Even if applicable, unpreserved error does not tie a rope around the Court of Appeals, which may review for plain error under Rule 84.13(c). And any questions about the Court's authority to dispose of the appeal are answered succinctly by Rule 84.14:

"The appellate court shall award a new trial or partial new trial, reverse or affirm the judgment or order of the trial court, in whole or in party, or give such judgment as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case." Rule 84.14. While an appellate court should finally dispose of a case if it can, it should only do so if the record is such to invest confidence in the reasonableness, fairness and accuracy of the court's conclusion. If not, reversal and remand necessarily follow. *Landreth v. Gan*, 647 S.W.2d 932, 936 (Mo. Ct. App. 1983); *see also, e.g., Vic Koepke Excavating & Grading Co. v. Kodner Development Co.*, 571 S.W.2d 253, 259 (Mo. banc 1978). The Court was well within its authority to reverse and remand for new trial on the issue of punitive damages in the "interests of justice" in *Kaplan I,* which is what it did. *See* 166 S.W.3d at 77.

D. The Trial Court's Ruling That The Bank Was Previously Found Liable For Punitive Damages Skewed The Jury's Determination Of Amount.

The trial court's misunderstanding of *Kaplan I* not only deprived the Bank of a determination of liability for punitive damages, but infected the entire trial. As a result, the Bank did not receive a fair determination of the only question that the court did submit to the jury—the amount of punitive damages.

Plaintiffs made Instruction 2 the focal point of their trial strategy. They characterized every attempt by the Bank to introduce mitigating evidence or otherwise explain its actions as a duplicitous effort to circumvent the supposed determinations of the first jury and the Court of Appeals. Throughout opening and closing arguments, Plaintiffs wove their theme that the Bank's efforts to undo what already had been

"decided" demonstrated yet more reprehensibility that should be punished by a large punitive damages award.

The trial court read Instruction 2 to the jury at the beginning of the trial. Plaintiffs reviewed it paragraph by paragraph in their opening statement, telling the jury that the instruction established that the Bank had engaged in reprehensible conduct. 2 Tr. 23-25. Plaintiffs said the instruction was "a product of . . . 12 jurors and four alternates . . . three years ago . . . when they heard . . . all of the evidence and they rendered a verdict. And the Judge is going to tell you that you have to respect the work that they did." 2 Tr. 25; *see* 2 Tr. 26.

Plaintiffs also relied on the theory that the Bank's liability for punitive damages had already been established in objecting to mitigating evidence. The court repeatedly sustained these objections, disregarding the Bank's right, under Missouri law and the federal Constitution, to put on mitigating evidence on the issue of punitive damages. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-80 (1999); *Moore v. Mo.-Neb. Express, Inc.*, 892 S.W.2d 696, 713 (Mo. Ct. App. 1994).[7]

For example, the court rejected several attempts by the Bank to introduce evidence that wrongful conduct by people other than the Bank contributed to Plaintiffs' injury.

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[7] Even if the issue of *liability* was properly withheld from the jury, the mitigating evidence was still relevant to the proper *amount* of punitive damages. *See Moore,* 892 S.W.2d at 713; *Humana Health Ins. Co. of Fla., Inc. v. Chipps*, 802 So.2d 492, 496-97 (Fla. Ct. App. 2001).

The Bank sought to ask Gary Vadja, who drafted the work plan, about Southern's responsibilities for proper disposal of the concrete. *See* 3 Tr. 118-19, 121-25. The trial court, however, sustained Plaintiffs' objection that the Bank was "trying to relitigate" its liability for punitive damages. 3 Tr. 119, 125. When the Bank asked Leonard Werre whether he and Winter agreed to place the concrete in the ditch, the court again sustained Plaintiffs' objection. 8 Tr. 11. When the Bank sought to elicit testimony from Karen Myers about her belief that Southern would take responsibility for removing the concrete from the ditch, the court sustained Plaintiffs' objection again. 7 Tr. 87-90.

The court also rejected several of the Bank's attempts to introduce evidence of its lack of knowledge that the concrete was placed on Plaintiffs' property. For instance, when the Bank asked a DNR representative whether anyone at the Bank knew the concrete did not go to a landfill, Plaintiffs objected that liability for punitive damages had been determined, which the court sustained. 8 Tr. 73-74.[8] The cumulative result of the trial court's rulings was a one-sided presentation of evidence, in which the jury was told

[8] Plaintiffs were not always clear whether their objection was aimed at the Bank's supposed effort to relitigate its liability for punitive damages or its underlying liability for negligence. *See, e.g.*, 5 Tr. 115. In either event, the trial court erred in rejecting the proffered evidence, which was relevant to both the Bank's liability for punitive damages as well as amount. The Bank could hardly have used the evidence to contest its tort liability since the only issue in the second trial was punitive damages.

to pick a number of punitive damages without all the information necessary to make an accurate choice.

In closing argument, Plaintiffs returned to their theme that the Bank's attempt to litigate its liability for punitive damages was reprehensible conduct. Plaintiffs told the jury that "[t]his case is about . . . taking responsibility." 10 Tr. 7. They stated that in "a three-week trial in 2001" the jury "found the . . . bank liable for punitive damages based on the evidence that the bank had consciously disregarded our rights, our clients' rights." 10 Tr. 7-8. Plaintiffs told the jury that "[t]he Court of Appeals upheld th[at] finding[] and sent this case back to you . . . to decide only the amount, if any, of punitive damages that should be awarded." 10 Tr. 8. Plaintiffs implored the jury to punish the Bank for "disregarding" the prior findings, stating: "Well, if you didn't know whether punitive damages were necessary to punish and deter, now you do. Because this instruction says for the purpose of this trial you should not question the findings, but must accept them as true." 10 Tr. 39. They continued: "[A]sk yourself whether the defendant in this case has any regard for what that prior jury did. Whether they care what the Court of Appeals said. They came into this courtroom for the last two weeks and tried to relitigate a case 12 men and women from St. Charles heard for three weeks in 2001. . . . They changed some testimony, they added some new stuff, but they relitigated an issue that is already done." 10 Tr. 40; *see also* 10 Tr. 43, 44-45.

The trial court's misunderstanding of *Kaplan I* tainted the entire trial, beginning to end. The result of that flawed process was a punitive damages award that is grossly excessive, in violation of both Missouri law and due process.

II. THE TRIAL COURT ERRED IN REFUSING TO REMIT THE PUNITIVE DAMAGES AWARD BECAUSE THAT AWARD IS EXCESSIVE UNDER MISSOURI LAW, IN THAT THE BANK'S NEGLIGENCE WAS NOT MALICIOUS OR REPEATED, THE HARM TO PLAINTIFFS ONLY OCCURRED DUE TO THE NEGLIGENCE OF OTHERS, AND THE BANK DID NOT KNOWINGLY VIOLATE A RULE DESIGNED TO PREVENT THE HARM.

The $5 million punitive damages verdict against the Bank is grossly excessive. The Bank was found liable only for negligence in monitoring Southern's disposal of waste concrete. Southern was obligated by contract to "properly dispose" of the concrete. Def's Ex. M616, App. B. The Bank therefore believed that Southern had taken the concrete to a landfill, as the work plan required. Further, the concrete was not hazardous under state or federal law, and caused only economic injury, for which Plaintiffs were made whole by a compensatory award of $650,000. The punitive damages award, together with $3.2 million in prejudgment interest, is over *eleven times* that amount. The trial court's refusal to remit the award, L.F. 1218-19, 1384, was error.

Under Missouri law, the punitive damages remedy is "so extraordinary or harsh that it should be applied only sparingly." *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996). Missouri courts may remit excessive punitive damages. *See* Mo. Rev. Stat. § 510.263.6. Whether an award is excessive depends on several factors. *Call v. Heard*, 925 S.W.2d 840, 849-50 (Mo. banc 1996). One "critical" factor is "the degree of malice or outrageousness of the defendant's conduct." *Id.* at 849. Further, a

punitive damages award based on negligence "may be reduced when (1) similar occurrences known to the defendant have been infrequent; (2) injury likely occurs only with another's negligence; or (3) the defendant did not knowingly violate a rule designed to prevent the injury." *Werremeyer v. K.C. Auto Salvage Co.*, 134 S.W.3d 633, 636 (Mo. banc 2004). Here, all of those factors require remittitur.

Standard of Review.

The trial court's refusal to remit is reviewed for abuse of discretion. *See Call*, 925 S.W.2d at 849.

A. The Bank's Conduct Was An Isolated Incident Of Negligence That Was Far From Malicious Or Outrageous.

The Bank's conduct was far from malicious or outrageous. It made a mistake. Southern had expressly agreed by contract to "properly dispose[]" of the concrete after removal from the Lackland Road site. Def's Ex. M616, App. B. Relying thereon, the Bank assumed Southern would take the concrete to a landfill. 5 Tr. 113-14, 7 Tr. 51. The Bank should have been more careful in monitoring Southern's disposal of the concrete, but its mistake was an isolated incident. And there certainly was no intent to harm Plaintiffs. The Bank did not even know that Southern had placed the concrete on Plaintiffs' property until six months later. *See, e.g.*, 6 Tr. 164. Also, Plaintiffs' injury was only economic, for which they have been fully compensated. *See* 166 S.W.3d at 77.

Because the concrete was not hazardous, neither federal nor state law required its disposal at a landfill. L.F. 1127. Only the work plan contained that requirement. Pls' Ex. 78 at 14; L.F. 125. Plaintiffs were neither parties to nor intended beneficiaries of that

agreement. Pls' Ex. 78 at 1. Had they been parties to the work plan and sued for its breach, Plaintiffs likely could not have recovered *any* punitive damages. *See Carter v. St. John's Reg'l Med. Ctr.*, 88 S.W.3d 1, 23 (Mo. Ct. App. 2002) (punitive damages not generally available for breach of contract).

Punitive damages awards far smaller than the one here have been found excessive under Missouri law despite conduct far more blameworthy than the Bank's conduct. *See, e.g., Morrissey v. Welsh Co.*, 821 F.2d 1294, 1298-99 (8th Cir. 1987) ($750,000 award was excessive when negligent maintenance of a building caused a wall to collapse, crushing plaintiffs' vehicle and injuring them). Negligence resulting in serious personal injuries or death – much more serious than economic injury – has been found insufficient to even make a case *submissible* for punitive damages. *See, e.g., Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 231, 248-49 (Mo. banc 2001) (railroad's failure to upgrade warning devices caused a "devastating accident" resulting in "serious, permanent" personal injuries); *Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151, 160-61 (Mo. banc 2000) (electrical company's failure to warn of unmarked power lines, which had previously caused an accident, resulted in four deaths).

The Bank's post-deposit conduct, which took place long after the breach of duty for which it was found liable, L.F. 125, is not properly considered in determining punitive damages. *See infra* pp. 58-61. Even if relevant, it was not malicious or outrageous. Southern was contractually responsible for proper disposal of the concrete and had agreed to accept liability for all claims arising out of that disposal. Def's Ex. M616 at 3-4. Karen Myers believed that Southern had properly disposed of the concrete, 7 Tr. 54, and

when she learned otherwise, believed that Southern would take responsibility for cleaning the concrete up. 6 Tr. 173. When Southern failed to resolve the problem, the Bank proposed to clean up the concrete itself and put $250,000 in escrow for that purpose. Pls' Ex. 286. The Bank might have done things differently, but its conduct cannot justify any significant punitive damages, much less the multi-million dollar damages awarded.

B. The Harm To Plaintiffs Occurred Because Of The Negligence Of Others.

Plaintiffs' injury would not have occurred absent negligence by several parties other than the Bank. Southern was contractually responsible for removing the concrete from the Lackland Road property, "properly dispos[ing]" of it, and covering any liability arising from the disposal. Def's Ex. M616 at 3-4, App. B. Winter, on behalf of Southern, removed the concrete and placed it in the ditch. 9 Tr. 25. Winter only placed the concrete there because Leonard Werre – a nearby homeowner who believed the ditch was on his property – requested that Winter fill the ditch. 7 Tr. 164-67; 8 Tr. 11. Werre wanted to fill the ditch to stop the erosion on his property, 8 Tr. 8, and believed that he could do so based on his interactions with the City of St. Charles. The City had earlier placed concrete in the ditch in 1995, 8 Tr. 9-10, and Werre obtained permission from the City to place additional concrete there, 8 Tr. 12. These circumstances also support remittitur. *Werremeyer*, 134 S.W.3d at 636.

C. The Bank Did Not Knowingly Violate A Rule Designed To Prevent Plaintiffs' Injury.

The Bank also did not knowingly violate a "statute, regulation, or clear industry standard designed to prevent the type of injury that occurred." *Lopez*, 26 S.W.3d at 160. The Bank's liability was based on its failure to dispose of concrete under a work plan, L.F. 125, which was an agreement between private parties, not a "statute, regulation, or clear industry standard." The concrete was not hazardous under federal or state law, L.F. 1127, and the Bank did not violate any environmental law, 8 Tr. 74. Although the DNR sent notices of Missouri Clean Water Law violations to the homeowners, 7 Tr. 187-93, no notices were directed to the Bank, 8 Tr. 24-25. The Bank did not violate the Clean Water Law, because it neither placed the concrete in the ditch nor directed Southern to place the concrete there. *See* Mo. Rev. Stat. § 644.051.1(1). Indeed, *Kaplan I* held that Southern is not the Bank's agent, and the Bank cannot be held vicariously liable for Southern's conduct. *See* 166 S.W.3d at 66-69. The Bank certainly did not "knowingly" violate the Clean Water Law, because it was not even aware that Southern had deposited the concrete on Plaintiffs' property until well after the fact. 4 Tr. 94; 6 Tr. 164.

The Bank's lack of reprehensibility under each of the above factors demonstrates that that "the amount of punitive damages bears no reasonable relation to the injury inflicted on [Plaintiffs]" and failure to remit those damages was an abuse of discretion. *Wisner v. S.S. Kresge Co.*, 465 S.W.2d 666, 670 (Mo. Ct. App. 1971).

III. THE TRIAL COURT ERRED IN REFUSING TO REMIT THE PUNITIVE DAMAGES AWARD BECAUSE THAT AWARD VIOLATES DUE PROCESS, IN THAT THE BANK'S CONDUCT WAS NOT REPREHENSIBLE, THE RATIO OF PUNITIVE TO ACTUAL DAMAGES EXCEEDS 11 TO 1, THE AWARD DWARFS ANY COMPARABLE STATUTORY PENALTIES, AND THE AWARD IS BASED ON CONDUCT THAT DID NOT HARM PLAINTIFFS.

The punitive damages award here is so excessive that it violates the Due Process Clause of the Fourteenth Amendment to the federal Constitution. As the Supreme Court explained in *State Farm Mutual Auto Insurance Co. v. Campbell*, which was handed down shortly after *Kaplan I*, "[t]he Due Process Clause . . . prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." 538 U.S. 408, 416 (2003). Whether punitive damages are constitutionally excessive depends upon three factors: (1) the reprehensibility of the defendant's conduct; (2) the ratio of the punitive damages to the plaintiff's actual harm; and (3) the amount of comparable civil and criminal penalties. *See id.* at 418.

All three factors indicate that the punitive damages in this case are excessive. The Bank's conduct was not reprehensible. Yet the punitive damages award is over eleven times the already substantial compensatory award, and dwarfs any comparable statutory penalties. Further, the trial court allowed the jury to base the punitive damages on conduct bearing no relation to the Bank's underlying negligence. The Bank sought

remittitur and a new trial based on the clear due process violation, but the trial court refused to grant either. L.F. 1210-12, 1218-19, 1384.

Standard of Review.

The question whether a punitive damages award comports with due process is reviewed *de novo*. *State Farm,* 538 U.S. at 418.

A. The Bank's Conduct Was Not Reprehensible.

Reprehensibility is "the most important indicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 575 (1996). The Supreme Court has set out five factors for determining whether a defendant's conduct is reprehensible enough to justify an award: (1) "the harm caused was physical as opposed to economic"; (2) the defendant's conduct "evinced an indifference to or a reckless disregard of the health or safety of others"; (3) the plaintiff was "financial[ly] vulnerabl[e]"; (4) "the conduct involved repeated actions"; and (5) "the harm was the result of intentional malice, trickery, or deceit." *State Farm*, 538 U.S. at 419. *None* of those factors is present here.[9]

[9] Because the Bank's conduct was so clearly not reprehensible, Plaintiffs were forced to justify their demand for punitive damages by repeatedly pointing out the Bank's deep pockets. *See, e.g.*, 2 Tr. 83-84, 90; 7 Tr. 68; 10 Tr. 19, 21, 24-26. But "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *State Farm*, 538 U.S. at 427.

1. Only Economic Injury.

The harm to Plaintiffs was purely economic. As the jury instructions in the first trial made clear, Plaintiffs' sole injury was property damage. *See* L.F. 128. This fact was also recognized in *Kaplan I*. *See* 166 S.W.3d at 75 (Plaintiffs' injury was "harm to the value of the property on which the contaminated material was disposed"); *id.* at *72 (damages were "[t]he cost of cleaning up the contamination on plaintiffs' property"). The cost of remediating Plaintiffs' property was approximately $636,000. *Id.* The compensatory damages of $650,000 more than reimbursed them for that economic loss. L.F. 179.

Recent cases interpreting *State Farm* leave no doubt that the multi-million dollar punitive damages award for the purely economic injury in this case is excessive. In cases involving only economic injury, the federal courts of appeals have frequently remitted punitive damages awards that were significantly smaller than the award here. *See, e.g.*, *Kemp v. AT&T*, 393 F.3d 1354, 1362-65 (11th Cir. 2004) (remitting $1 million award in case involving fraudulent billing practices); *Fabri v. United Techs. Int'l, Inc.*, 387 F.3d 109, 124-27 (2d Cir. 2004) (finding $500,000 award excessive where "solely economic loss" was caused by breach of sales representation agreement, even though breach was "intentional and motivated by malice"). Even in cases of physical injury or death – much more serious harm than property damage – the courts of appeals have reduced punitive damages awards to levels much lower than the award in this case. *See, e.g.*, *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 832-34 (8th Cir. 2004) (remitting award to $2 million in a case in which nursing home's negligence caused patient to suffer "a

perforated bowel, the worst case of abdominal contamination her surgeon had ever seen, and death"); *DiSorbo v. Hoy*, 343 F.3d 172, 186-89 (2d Cir. 2003) (finding $1.275 million award excessive when police officer "violently slammed [plaintiff's] head against the wall, choked her to the point where she began to lose vision, pushed her to the ground, and struck her"). Because Plaintiffs suffered only economic loss, the punitive damages award of $5 million (plus over $3 million in interest) is entirely unjustifiable.

2. No Reckless Disregard for Health or Safety.

The award is also excessive because the Bank's conduct did not present a risk to health or safety. As Plaintiffs stipulated, the concrete deposited in the ditch was not hazardous under either federal or state law. L.F. 1127. Although the concrete contained trace amounts of PCBs, those trace amounts did not pose a health or safety threat. 8 Tr. 66-69. Multiple tests showed no evidence that PCBs had leached into the water, Pls' Ex. 227 at 7-8, and there was no aquatic life in the ditch that could have been impacted by PCBs, 8 Tr. 70. Under those circumstances, it is unsurprising that no one was physically injured by the deposit of the concrete. *Id.*

In the absence of a health or safety risk, and particularly any reckless disregard for such a risk, the $5 million (plus interest) punitive damages award should be remitted. Indeed, the Eighth Circuit recently found a $5 million award to be the maximum allowed by due process *even when* a defendant had *knowingly* disregarded a *serious* health risk. *See Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005) (defendant "repeatedly" sold an "extremely carcinogenic and extremely addictive" product with "knowledge that the product was dangerous to the user's health," exhibiting

"a callous disregard for the adverse health consequences" of its product); *see also Stogsdill*, 377 F.3d at 832-34 ($2 million was maximum permissible award despite defendant's "conscious indifference to [the patient's] life-threatening change in condition").

3. Plaintiffs Not Financially Vulnerable.

The Bank also did not take advantage of a financially vulnerable plaintiff. Plaintiffs are far from economically vulnerable. Kaplan's net worth alone is approximately $20 million. 2 Tr. 12. Those significant financial resources enabled Plaintiffs to remediate their property even before this lawsuit, and they have since been made whole by substantial compensatory damages. 9 Tr. 86; L.F. 179. The multi-million dollar punitive damages award in this case certainly cannot be justified based on Plaintiffs' financial condition. *See Kemp*, 393 F.3d at 1362-65 (finding $1 million award excessive despite defendant's scheme "to exploit customers who were unsophisticated and economically vulnerable").

4. No Recidivism.

The fourth reprehensibility factor is also entirely absent here. The Bank's misconduct was based on a single event—deposit of concrete onto Plaintiffs' property by mistake. L.F. 125. Plaintiffs have not identified any similar situations in which the Bank has been negligent in complying with an environmental work plan, nor could they. The Bank clearly has not "repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful." *Gore*, 517 U.S. at 576.

5. No Intentional Malice, Trickery, or Deceit.

Finally, the deposit of concrete on Plaintiffs' property was not the result of intentional malice, trickery, or deceit—only negligence. The Bank did not intend that the concrete be deposited on Plaintiffs' property. It did not even know that the concrete had been placed there until several months after the fact. 6 Tr. 164; 7 Tr. 44-45, 56. Myers simply failed to closely monitor where Southern took the concrete. But the Bank's obligation to ensure that Southern properly disposed of the concrete arose from the work plan, and Plaintiffs were neither parties to that agreement nor its intended beneficiaries. Pls' Ex. 78. The Bank had absolutely *no* intent to harm Plaintiffs. Plaintiffs were not even in the picture. This is thus not a case in which the defendant intentionally "target[ed]" the plaintiff in order to cause his injuries. *Kemp*, 393 F.3d at 1363. The Bank's errors were sins of omission rather than commission. Such mere "negligence" is not equivalent to the "trickery and deceit" that warrants punitive damages. *Gore*, 517 U.S. at 576.

B. The 11-to-1 Ratio Of Punitive To Actual Damages Renders The Punitive Damages Award Unconstitutional.

The absence of all indicia of reprehensibility "renders *any* award [of punitive damages] suspect." *State Farm*, 538 U.S. at 419 (emphasis added). But the high ratio of punitive to actual damages conclusively establishes that the punitive damages are constitutionally excessive. Even without taking into account prejudgment interest, the

ratio of punitive to actual damages is more than 9 to 1.[10] But the trial court's award of prejudgment interest on both the compensatory and punitive damages should be considered an element of damages when calculating the ratio. *See Library of Cong. v. Shaw*, 478 U.S. 310, 321 (1986) ("Prejudgment interest . . . is considered as damages, not a component of 'costs.'"). When prejudgment interest is included, the ratio of punitive to compensatory damages is *more than 11 to 1*.

An 11-to-1 ratio is always extremely suspect, because "few awards exceeding a single-digit ratio" can ever satisfy due process. *State Farm*, 538 U.S. at 425. Indeed, the Supreme Court has observed that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Id.*[11] In a case like this one, there can be no doubt that a double-digit ratio is unconstitutional.

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[10] Exclusive of interest, the punitive damages award against the Bank was $5 million. The jury found the Bank liable for 80% of Plaintiffs' compensatory damages, L.F. 179, so the Bank's share of the compensatory damages for ratio purposes is $520,000. *See Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000) (holding that the "appropriate way of calculating the ratios" in a case of joint and several liability "is to divide the individual punitive damages awards by the individual pro rata shares of the actual damages").

[11] The Missouri legislature has recently enacted legislation that limits future punitive damages awards to five times the amount of compensatory damages. *See* Mo. Rev. Stat. § 510.265 (as enacted Mar. 29, 2005).

Plaintiffs received substantial compensatory damages that fully reimbursed them for their purely economic injury. The Supreme Court has made clear that, in those circumstances, punitive damages "*equal to compensatory damages*" approach "the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425 (emphasis added).

Recent Eighth Circuit decisions confirm that a 1-to-1 ratio is the maximum permissible in this case. For example, in a products liability case against a tobacco manufacturer, the Eighth Circuit reduced a $15 million punitive damages verdict to $5 million, which approximated the amount of compensatory damages. *Boerner*, 394 F.3d at 602-03. Although the manufacturer's conduct was "highly reprehensible," and its products – which were "substantially more" addictive and carcinogenic "than other types of cigarettes" – caused the plaintiff to suffer "a most painful, lingering death following extensive surgery," the Eighth Circuit determined that "a low ratio" was appropriate because of the large compensatory award. *Id.* In another recent case involving persistent race discrimination, the Eighth Circuit reduced a $6 million punitive damages verdict to $600,000, the amount of compensatory damages. *Williams v. Conagra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004). Even though the employer's conduct was reprehensible, the court found that the punitive damages, which were "more than ten times the compensatory award," could not be justified "[i]n the absence of *extremely* reprehensible conduct . . . or some special circumstance such as an extraordinarily small compensatory award." *Id.* at 798-99 (emphasis added). In this case, the Bank's conduct was not reprehensible, and there was a large award of compensatory damages. Under *State Farm*

and the Eighth Circuit cases interpreting it, the punitive damages here are clearly excessive.

C. The Bank Faced No Comparable Civil Or Criminal Penalties.

A final indication that the punitive damages are excessive is that the Bank faced no comparable civil or criminal penalties for its negligent conduct. Missouri law does not contain any statutory penalties for negligence. The most analogous penalties are those for trespass, and both the criminal and civil penalties for trespass are nowhere near as large as the punitive damages award in this case.[12] The maximum criminal penalty for trespass is $2,000, *see* Mo. Rev. Stat. §§ 560.021.1(3), 569.140, and the maximum civil penalty is three times the plaintiff's actual damages, *see* Mo. Rev. Stat. § 537.340. The punitive damages against the Bank thus dwarf any possible penalty for trespass. Further, trespass is an intentional tort, and the Bank was only found liable for negligence. *See* 166 S.W.3d at 66-71; L.F. 125; *see also supra* note 5. The fact that Missouri law provides *no* criminal or civil penalties for negligence strongly suggests that the Bank's negligent conduct should not be the basis for a multi-million dollar punitive damages award.

[12] Penalties for violation of the Missouri Clean Water Law are not analogous since the Bank has not and cannot be found liable for violating that law. *See Supra* p. 49.

D. The Punitive Damages Were Based On Conduct Unrelated To The Bank's Negligence.

The trial court contributed to the excessiveness of the punitive damages award by erroneously allowing the jury to base that award on conduct other than the Bank's negligence. The Supreme Court has made clear that the conduct that supports a punitive damages verdict "must have a nexus to the specific harm suffered by the plaintiff." *State Farm*, 538 U.S. at 422. "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Id.* *See also Stogsdill,* 377 F.3d at 832-33. But that is just what happened here.

In this case, as in *State Farm*, "[f]rom their opening statements onward," Plaintiffs urged the jury to award punitive damages for conduct that did not injure them. *Id.* at 420. Before trial, the Bank submitted several motions in limine to prevent Plaintiffs from introducing evidence of conduct unrelated to the Bank's negligence, but the trial court rejected them. 1 Tr. 26-63, 79-80; L.F. 810-15, 820-48, 1127-28. Plaintiffs then used evidence of unrelated conduct to support their punitive damages claim.

For example, Plaintiffs argued that the Bank's litigation behavior warranted punitive damages. As described above, Plaintiffs repeatedly contended that punitive damages were necessary to punish the Bank for its purported disregard of the "determinations" of the prior jury and Court of Appeals. *See supra* pp. 41-42, 44. Plaintiffs likewise argued that the Bank's decision to defer payment of the compensatory damages until it had exhausted its appeals demonstrated its refusal to abide by the prior judgment. *See* 2 Tr. 37, 94; 10 Tr. 40. Similarly, Plaintiffs relied on the general denials

in the Bank's Answer as evidence of its refusal to take responsibility for its actions. *See* 6 Tr. 179-80; 9 Tr. 66-70; 10 Tr. 23. In addition, Plaintiffs introduced evidence of defense counsel's conversations with consultant Stephen Sweet about the validity of the subpoena for his attendance at the first trial to suggest that the Bank did not want Sweet to "come to trial and tell [his] story." 5 Tr. 37, 46.

The Bank repeatedly objected to this evidence, but the court overruled the objections. *E.g.*, 1 Tr. 53; 6 Tr. 193. That was error because allowing punitive damages to be imposed based on litigation conduct is inconsistent with *State Farm*'s holding that a defendant's dissimilar acts may not serve as the basis for those damages. For this reason, a defendant's "aggressive defense at trial" cannot support a punitive damages award. *Alcorn*, 50 S.W.3d at 248.

The trial court also erroneously allowed Plaintiffs to argue, over the Bank's objections, that punitive damages were warranted because the Bank maintained Gusdorf as the owner of the Lackland Road property during the initial remediation effort. L.F. 804-09; 1 Tr. 32-36; 6 Tr. 193-97. Plaintiffs argued that Gusdorf's continued existence showed that the Bank refused to take responsibility for the Lackland Road contamination. *E.g.*, 10 Tr. 19. But the Bank's maintenance of Gusdorf as the corporate owner of that site did not contribute in any way to the placement of the concrete on Plaintiffs' property, and it therefore cannot be the basis for punitive damages.

Plaintiffs also argued that the Bank should be punished because it "lied . . . to the [DNR]," 10 Tr. 23, when it said that "Gusdorf and Cooper . . . undertook an environmental cleanup" at Lackland Road and that "Gusdorf contracted with Southern to

remove the rubble" from the property, Pls' Ex. 263 at 1. Of course, the Bank's statements were true: Gusdorf was a party to both the agreement with Cooper and the contract with Southern. Pls. Ex. 69, 78; Def's Ex. M616. But, even if false, the Bank's statements to the DNR did not cause any harm to *Plaintiffs*. Plaintiffs used Gusdorf to portray the Bank as "an unsavory . . . business" in need of punishment. *State Farm* bars the use of unrelated evidence for this purpose. 538 U.S. at 423.

"The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance" over an extended period of time. *State Farm*, 538 U.S. at 424; *see also Vaughn v. N. Am. Sys., Inc.*, 869 S.W.2d 757, 759 (Mo. banc 1994) (a plaintiff may not "rove through all of a defendant's conduct that might justify punishment, but that caused plaintiff no injury"). The trial court's admission of numerous categories of unrelated evidence allowed precisely that. Plaintiffs relied on a decade's worth of conduct other than the acts for which the Bank was found liable to incite and to give the jury every possible reason to punish the Bank. That evidence contributed to an excessive punitive damages award that cannot stand.[13]

[13] At a new trial, the trial court should be instructed, in accordance with *State Farm*, that the evidence must be limited to conduct related to the Bank's negligence in failing to comply with the work plan and that any punitive damages may not exceed the amount of Plaintiffs' compensatory damages.

IV. THE TRIAL COURT ERRED IN AWARDING PREJUDGMENT INTEREST BECAUSE PLAINTIFFS DID NOT MEET THE REQUIREMENTS OF MO. REV. STAT. § 408.040.2 AND OTHER APPLICABLE MISSOURI LAW, IN THAT THEY DID NOT MAKE AN OFFER OF SETTLEMENT OR DEMAND FOR PAYMENT, ANY DEMAND WAS INSUFFICIENTLY DEFINITE, AND THEIR MOTION FOR PREJUDGMENT INTEREST WAS UNTIMELY.

The trial court compounded the excessive punitive damages in this case with an erroneous award of $3.2 million in prejudgment interest. Plaintiffs are not entitled to prejudgment interest because they did not satisfy the prerequisites under Missouri law. Plaintiffs did not comply with the Missouri statute governing prejudgment interest in tort cases, which required that they make a "demand for payment or an offer of settlement" in definite terms. Mo. Rev. Stat. § 408.040.2 (2000).[14] Nor did they make a timely motion for prejudgment interest.

Standard of Review.

This Court reviews *de novo* the requirements of Section 408.040.2 and Plaintiffs' compliance with those requirements. *See Smith v. Shaw*, 159 S.W.3d 830, 833 (Mo. banc 2005).

[14] The statute has recently been amended. *See* Mo. Rev. Stat. § 408.040.2 (as amended Mar. 29, 2005). References to the statute in this brief are to the 2000 version.

A. Plaintiffs Did Not Satisfy The Statutory Requirements For Prejudgment Interest.

To obtain prejudgment interest, Plaintiffs must "ha[ve] made a demand for payment of a claim or an offer of settlement of a claim . . . and the amount of the judgment or order [must] exceed[] the demand for payment or offer of settlement." Mo. Rev. Stat. § 408.040.2. Any demand or offer must be "definite in its terms." *Brown v. Donham*, 900 S.W.2d 630, 633 (Mo. banc 1995). The prejudgment interest statute is interpreted narrowly as an exception to the general rule that prejudgment interest is not awarded in tort cases. *See Emery v. Wal-Mart Stores*, 976 S.W.2d 439, 449 (Mo. banc 1998).

Plaintiffs' claim for prejudgment interest is based on a letter they sent in August 1997 to eleven potential defendants enclosing a "Notice of Intent to File Citizen Suit" under federal environmental law. L.F. 1175-79. The notice was the statutory prerequisite to filing that lawsuit. *See id.* Plaintiffs filed their federal suit in November 1997. L.F. 943. They voluntarily dismissed the suit after the district court dismissed most of their claims because the concrete in the ditch was nonhazardous under federal law. *Id.*; *see* Order in No. 4:97-CV-02372-CEJ (E.D. Mo. July 31, 1998).

After the verdict in the second trial, Plaintiffs claimed for the first time that the letter noticing their intent to file the *federal* suit was a demand for payment to resolve the claims in *this* suit. L.F. 1162. The trial court agreed and awarded $3.2 million in prejudgment interest over the Bank's objection. L.F. 1307. That interest award was erroneous because Plaintiffs plainly did not meet the requirements of Section 408.040.2.

1. No Offer of Settlement or Demand for Payment.

Plaintiffs have acknowledged that the 1997 letter was not a settlement offer. 11 Tr. 16. Neither was the letter a "demand," much less a "demand *for payment*." The 1997 letter simply gave notice of Plaintiffs' intent to file a federal lawsuit as "required pursuant to" four federal environmental statutes they cited. L.F. 1175. The letter stated that Plaintiffs "*will file* a civil lawsuit in federal district court in the State of Missouri" "for the purpose of obtaining a court order requiring Defendants to take corrective action to remove hazardous and solid wastes from a creek located on property owned by" Plaintiffs. L.F. 1178 (emphasis added). The letter also stated that Plaintiffs would seek to recover "actual and punitive damages under Kaplan's state law claims." *Id.* The letter did not demand that the Bank take *any* action. Nor did it suggest that there were *any* circumstances under which Plaintiffs would not file their suit. The letter requested no response from the Bank at all. In fact, Plaintiffs had directed their attorneys to file the lawsuit five months before they sent the letter. Def's Ex. M79 at 1. The letter was not a demand; it was the announcement of a *fait accompli*.

To the extent that the letter could be construed as demanding anything, it certainly was not a "demand *for payment*". Plaintiffs themselves characterize the letter as a demand for "corrective action." L.F. 1167. *See* Transf. App. at 10. This characterization harkens to the purpose of the federal notice requirement as giving the alleged environmental violator a chance to *comply* with the relevant federal environmental statutes. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987); L.F. 1166, 1248-50. Injunctive remedies under, or an action to enforce

compliance with, federal environmental standards is fundamentally different than a payment of money to compensate for tort damages. Indeed, the ditch already *was* in compliance with federal law; that is why Plaintiffs' federal lawsuit was dismissed. L.F. 1229.

The plain language of Section 408.040.2 requires a demand for "payment," not a demand for "corrective action." Mo. Rev. Stat. § 408.040.2. Plaintiffs may not expand the statute beyond its express terms. *See Emery*, 976 S.W.2d at 449 ("The court should regard the statute as meaning what it says. A court may not add words by implication to a statute that is clear and unambiguous." (citation omitted)).[15] As the Court of Appeals

[15] Allowing a demand for "corrective action" to substitute for the required demand for "payment" would also frustrate one of the purposes of the statute to promote settlement "where liability and damages are fairly certain." *Brown*, 900 S.W.2d at 633. It achieves that purpose by allowing prejudgment interest when a plaintiff has demanded payment, the defendant has declined, and the plaintiff recovers more than the amount demanded. *See* Mo. Rev. Stat. § 408.040.2. A "demand for payment" is necessary to enable a defendant to decide whether to pay or go to trial. Here, Plaintiffs made no such demand. *Cf., e.g., Call*, 925 S.W.2d at 853 (demand for payment was made where plaintiffs sent letter saying "let this letter serve as a settlement demand in the sum of $10 million to resolve all of the wrongful death and personal injury actions arising from this tragedy"). Of course, a demand for payment also is necessary to know whether the amount of a judgment exceeds the amount demanded, as also required under Section 408.040.2.

correctly found, Plaintiffs' letter simply was not an "offer of settlement" or a "demand for payment" as required by Section 408.040.2. The letter was exactly what it purported to be, no more and no less: "a notice of intent to file a federal lawsuit as required by federal statutes." *Kaplan II,* 2005 WL 3041002 at *6. This ends the analysis.

2. Demand Not Sufficiently Definite.

Plaintiffs' 1997 letter failed to comply with Section 408.040.2 for the additional reason that its terms were not sufficiently definite, as found by the Court below. *Kaplan II*, 2005 WL 3041002 at *6. In so finding, the Court of Appeals relied on this Court's analysis in *Brown*, 900 S.W.2d 630 that "[t]he demand . . . must be definite in its terms" because it is "analogous to an offer in contract." *Id.* at 633. "[F]or a demand to be sufficiently definite under § 408.040.2, the amount due must be readily ascertainable. While the demand need not always be expressed in dollars and cents, it must nonetheless be capable of ascertainment in a certain dollars and cents amount." *Id.* (internal quotation marks and citations omitted).[16] The requirement that the amount be either explicitly stated or "readily ascertainable" is based on the "general rule" that "prejudgment interest

[16] Plaintiffs suggest that the Court of Appeals departed from *Brown* in requiring that their "demand" be expressed in a dollars and cents amount. Transf. App. at 10-11. This is patently untrue. The Court expressly recognized the quoted principle from *Brown*, making only an initial observation that Plaintiffs specified no dollar amount in their letter (which they did not, L.F. 1175-79), and going on to find that no amount was ascertainable. *Kaplan II*, 2005 WL 3041002 at *6.

is not recoverable on an unliquidated demand." *Ritter Landscaping, Inc. v. Meeks*, 950 S.W.2d 495, 497 (Mo. Ct. App. 1997). "[W]here the person liable does not know the amount he owes, he should not be considered in default because of failure to pay." *Id.*

Missouri courts have therefore refused to find a sufficiently definite demand when it is unclear what amount would satisfy the plaintiff. In *Brown*, for example, this Court determined that a demand for payment of the "policy limits of all insurance coverages that apply to this case, including liability and medical payments coverages," was not a demand for a "readily ascertainable" amount because it was unclear whether the "per person" or "per occurrence" policy limits would be applicable, and there were "disputed issues of medical payment coverage and the stacking of other policies." *Brown*, 900 S.W.2d at 633; *see also Mendota Ins. Co. v. Hurst*, 965 F. Supp. 1282, 1287-90 (W.D. Mo. 1997) (similar). Here, in terms of "corrective action," Plaintiffs set forth no terms or conditions defining what that would entail. In terms of claims and amount, Plaintiffs' letter stated only that, in the federal lawsuit, "Kaplan w[ould] also seek to recover . . . actual and punitive damages under Kaplan's state law claims." L.F. 1178. It did not indicate the nature of the state law claims, let alone an amount that would satisfy those claims. *See Kaplan II*, 2005 WL 3041002 at *6.

Plaintiffs urge that the amount of their "demand" was ascertainable because the Bank should have known the cost of removing the concrete based on a bid of $107,000 obtained by Winter for that work. *See* L.F. 1254. Plaintiffs, however, never presented Winter's bid to the Bank as their demand, and never suggested that the amount of the bid would resolve their claims against the Bank. To the contrary, Plaintiffs have never

limited their requests to mere removal of the concrete, but also sought testing of the concrete and surrounding area for PCBs, indemnification for all liability, costs, and attorney's fees. *See, e.g.*, Pls' Ex. 236 at 2; Pls' Ex. 242 at 2-3. Plaintiffs have never suggested a dollar amount that would have satisfied their litany of other requests. *See* Pls' Ex. 236 at 1-3; 9 Tr. 55-60. Plaintiffs rejected a remediation plan proposed by the Bank in August 1999, under which the Bank placed $250,000 in escrow to fund the cleanup of the ditch. *See* Pls' Ex. 286; Pls' Ex. 298 at 3-5. That proposal included excavation, transport, and disposal of the concrete; coordination with the DNR; and sampling in the ditch to ensure the cleanup was successful. *See* Pls' Ex. 286 at 5-6. Plaintiffs rejected the proposal in part because it capped the cleanup amount at $250,000. *See* Pls' Ex. 298 at 4; 10 Tr. 24.

Plaintiffs suggest that the Court of Appeals' observation that "Plaintiffs never indicated that the [$107,000 bid amount] would resolve all their claims against the Bank" fails to appreciate the distinction between an offer of settlement and a demand for payment. Plaintiffs say there is no statutory requirement that a demand for payment "expressly indicate that satisfaction of the demand will settle the plaintiff's claims" and that satisfaction of a claim may be "implied from the circumstances of the demand" such as, for example, a demand for payment of a promissory note where a payment would "eliminate[] the claim." Transf. App. at 11. Plaintiffs miss the point, which is simply that the $107,000 estimate for hauling off the concrete was never presented as a demand,

or the amount that would suffice in payment, or "satisfaction" of any claim—expressly or by implication.[17]

Plaintiffs' own arguments in this lawsuit confirm that $107,000 was not the limit of what they wanted. In defending the timeliness of their request for prejudgment interest before the trial court, Plaintiffs stated that their "demand" was the amount of compensatory damages they recovered in the first trial – $650,000. *See* L.F. 1258; 11 Tr. 15, 22. Plaintiffs' argument quantifies the "corrective action" they sought as whatever it took to satisfy them, ultimately whatever sum the jury decided to award in actual damages. 12 Tr. 30-31. The 1997 letter also indicated that Plaintiffs wanted *punitive damages*, L.F. 1178, which by nature are highly subjective and without means of advance calculation. Missouri courts have never upheld an award of prejudgment interest on

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[17] Plaintiffs suggest that consideration of these facts somehow is contrary to *Lester v. Sayles*, 850 S.W.2d (Mo. banc 1993) and *McCormack v. Capital Electric Constr. Co., Inc.*, 159 S.W.3d 387 (Mo. Ct. App. 2004). *See* Transf. App. at 12. *Lester* holds that prejudgment interest is properly calculated from the date of the plaintiff's first demand, regardless of subsequent offers of settlement. *McCormack* holds that a plaintiff need not made a second settlement demand after remand. Neither of these subjects is at issue here. The question is whether Plaintiffs complied with Section 408.040.2 in the first instance. The Court's factual observations are only in aid of addressing Plaintiffs' arguments that their supposed "demand" was quantifiable by reference to the $107,000 bid. *See Kaplan II*, 2005 WL 3041002 at *6. Plaintiffs cite no case with which this conflicts.

punitive damages where the plaintiffs did not demand a specified dollar amount. *See, e.g.*, *Werremeyer*, 134 S.W.3d at 635-37 (plaintiffs "offered to settle . . . for $20,000"). Allowing hypothetical, roving numbers to qualify as "readily ascertainable" would eviscerate any definiteness requirement at all, and frustrate the purposes of the prejudgment interest statute. Not only do roving numbers make Plaintiffs' "demand" nonquantifiable, any demand equated with what the jury awards is, for that very reason, disqualified from prejudgment interest. Section 408.040.2 requires the judgment to exceed the demand, not be equal to it.

B. Plaintiffs' Motion for Prejudgment Interest Was Untimely.

Plaintiffs are also not entitled to prejudgment interest because their motion seeking interest was untimely. Plaintiffs were awarded both compensatory and punitive damages by the first jury on August 31, 2001. L.F. 178-82. Judgment was entered against the Bank on September 24, 2001, L.F. 183-84. An amended judgment was entered on October 26, 2001, L.F. 185-86. That judgment became final on January 10, 2002, when the trial court denied defendants' post-trial motions. *See* Mo. S. Ct. Rule 81.05(b)(2); L.F. 274-75.

Plaintiffs were required to seek and obtain prejudgment interest within thirty days of the entry of judgment in the first trial, and certainly no later than when the judgment became final. *See* Mo. S. Ct. Rule 75.01; Mo. S. Ct. Rule 78.04; *Am. Family Mut. Ins. Co. v. Hart*, 41 S.W.3d 504, 513 (Mo. Ct. App. 2000), *overruled on other grounds by Blue Ridge Bank & Trust Co. v. Hart*, 152 S.W.3d 420, 425 n.8 (Mo. Ct. App. 2005); *AGC Ins. Fund v. Jetco Heating & Air Conditioning, Inc.*, 815 S.W.2d 141, 142 (Mo. Ct.

App. 1991). Plaintiffs did not seek prejudgment interest until June 11, 2004, two weeks after the end of the *second* trial. L.F. 1162. Nonetheless, the trial court awarded it. L.F. 1307.

Plaintiffs waived their claim to prejudgment interest by failing to request it after they obtained a verdict against the Bank in the first trial. *See, e.g.*, *City of Kansas City ex rel. Jennings v. Integon Indem. Corp.*, 857 S.W.2d 233, 238 (Mo. Ct. App. 1993). Plaintiffs themselves have effectively recognized that their request for prejudgment interest was untimely with respect to the compensatory award. Plaintiffs calculated the interest on that award from the date that their "demand" expired to the date of the judgment in the first trial. L.F. 1168. This calculation reflects Plaintiffs' belief that their claim for prejudgment interest ripened at the conclusion of the *first* trial. It cannot be reconciled with Plaintiffs' contention that their motion for prejudgment interest was timely even though it was not filed until after the *second* trial. Thus, Plaintiffs' motion for prejudgment interest was untimely, and the interest award should be reversed for this reason also.

V. THE TRIAL COURT ERRED IN AWARDING PREJUDGMENT INTEREST BECAUSE THE RULE ANNOUNCED IN *WERREMEYER*, WHICH PERMITS PREJUDGMENT INTEREST ON PUNITIVE DAMAGES, SHOULD NOT BE APPLIED RETROACTIVELY, IN THAT THE RULE DEPARTED FROM CLEAR PAST PRECEDENT, RETROACTIVE APPLICATION WOULD NOT FURTHER THE RULE'S PURPOSES, AND THE BALANCE OF INTERESTS FAVORS ONLY PROSPECTIVE APPLICATION.

The prejudgment interest award should also be reversed because the rule allowing prejudgment interest on punitive damages should not be applied retroactively to this case. That rule was not established until this Court's decision in *Werremeyer*, which was issued well after Plaintiffs made their purported demand for payment. *See* 134 S.W.3d at 636-37. The Bank argued that *Werremeyer* should not be applied here, but the trial court rejected that argument. L.F. 1240-42, 1307. That was error.

In order to avoid hardship or injustice, Missouri courts may apply a new rule announced in a judicial decision prospectively. *See Sumners v. Sumners*, 701 S.W.2d 720, 722-23 (Mo. banc 1985). Whether a rule should be applied prospectively depends primarily on three factors: (1) whether the rule established a new principle of law by overruling clear past precedent; (2) whether the purpose and effect of the new rule would be enhanced by retroactive application; and (3) whether the reliance on the old rule outweighs the hardship that prospective application would cause the party that would benefit from the new rule. *See id.* at 724. All three of those factors weigh in favor of

applying the *Werremeyer* rule only prospectively. Moreover, allowing interest on the punitive damages here would raise serious constitutional questions because of the size of the resulting penalty and the Bank's lack of notice.

Standard of Review.

Whether a rule announced in a judicial decision should be applied retroactively is a question of law reviewed *de novo*. *See Sumners*, 701 S.W.2d at 722-24.

A. *Werremeyer* Established A New Principle Of Law By Overruling Clear Past Precedent.

Werremeyer established a new principle of law by overruling a series of cases that clearly held that prejudgment interest could not be awarded on punitive damages. Before *Werremeyer*, the uniform view of Missouri's lower appellate courts was that a plaintiff could *not* obtain prejudgment interest on punitive damages. *See Anderson v. Shelter Mut. Ins. Co.*, 127 S.W.3d 698, 702-03 (Mo. Ct. App. 2004), *overruled by* 134 S.W.3d 633 (Mo. banc 2004); *Hoskins v. Bus. Men's Assurance*, 116 S.W.3d 557, 579-82 (Mo. Ct. App. 2003), *overruled by* 134 S.W.3d 633 (Mo. banc 2004); *Werremeyer v. K.C. Auto Salvage, Co.*, No. WD61179, 2003 WL 21487311, at *15 (Mo. Ct. App. June 30, 2003) ("There are no Missouri cases in which prejudgment interest on punitive damages has been awarded."), *overruled by* 134 S.W.3d 633 (Mo. banc 2004). In announcing the *Werremeyer* rule, this Court specifically noted that it "*overruled*" the court of appeals precedent to the contrary. 134 S.W.3d at 637 (emphasis added). That overruling of court of appeals precedent satisfies the first *Sumners* factor. *See Sumners*, 701 S.W.2d at 724.

B. The Purposes Of The *Werremeyer* Rule Would Not Be Enhanced By Its Retroactive Application.

In addition, the purposes of the *Werremeyer* rule would not be advanced by retroactive application of that rule. The purposes of prejudgment interest are to "compensate[] claimants for the true cost of money damages they have incurred due to the delay of litigation" and "promote[] settlement and deter[] unfair benefit from the delay of litigation." *Brown*, 900 S.W.2d at 633. A retroactive award of prejudgment interest cannot promote settlement or discourage delay because the decision not to settle occurred years ago, when the settlement offer or demand was rejected.

Here, Plaintiffs made their alleged "demand" in 1997. The *Werremeyer* rule was not established until 2004. Application of that rule to the Bank thus could not possibly have any deterrent effect. *See Trans UCU, Inc. v. Dir. of Revenue*, 808 S.W.2d 374, 378 (Mo. banc 1991) (declining to apply retroactively a new rule interpreting a tax because the transaction subject to the tax had already been completed when the rule was established). "No deterrent effect can take place . . . by applying a new rule to an incident which occurred [more than] five years before that rule was established." *Spotts v. City of Kansas City*, 728 S.W.2d 242, 249 (Mo. Ct. App. 1987).

Similarly, retroactive application of the *Werremeyer* rule would not compensate Plaintiffs for the lost value of their money. Plaintiffs simply had no entitlement to punitive damages until those damages were awarded. *See Taft Broad. Co.*, 708 S.W.2d at 660 ("[P]unitive damages are remedial and a plaintiff has no vested right to such damages

prior to the entry of judgment."). Because neither purpose of the *Werremeyer* rule would be furthered by its retroactive application, the rule should be applied only prospectively.

C. Reliance On The Old Rule Outweighs The Hardship Caused By Prospective Application Of The *Werremeyer* Rule.

Finally, the Bank's reliance on the rule that prejudgment interest was not allowed on punitive damages clearly outweighs the hardship that Plaintiffs would suffer if the new rule is not applied here. Prejudgment interest would give Plaintiffs a windfall. Until *Werremeyer*, the widespread belief was that prejudgment interest was not available on punitive damages. *See* 9 A.L.R.5th 63 (2005) (citing cases). Likely because of that belief, Plaintiffs never sought prejudgment interest until after the second trial, even though they received sizeable punitive damages in the first trial. Plaintiffs thus "had no expectation" that they could receive prejudgment interest on punitive damages, yet they "now attempt[] to avail [themselves]" of the *Werremeyer* rule to obtain an almost $3 million windfall. *Trans UCU,* 808 S.W.2d at 378.

On the other hand, retroactive application of the rule would impose substantial hardship on the Bank. The almost $3 million in prejudgment interest on the punitive damages is more than *half* the total award of both compensatory and punitive damages. The interest results in a ratio of punitive to compensatory damages that exceeds 11 to 1, imposing massive liability on the Bank, in violation of due process. *See supra* pp. 50-58**.** Further, at the time that the Bank received Plaintiffs' alleged demand, it had no reason to believe that it could be saddled with *both* punitive damages *and* interest on those damages. *See Gore*, 517 U.S. at 574 ("Elementary notions of fairness . . . dictate that a

person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."). The serious constitutional issues posed by the prejudgment interest award provide powerful reasons to apply the *Werremeyer* rule prospectively. *See State Farm*, 538 U.S. at 417. The award of prejudgment interest must also be rejected for these reasons.

CONCLUSION

The trial court fundamentally misunderstood the *Kaplan I* mandate, and as a result, it *took* from the jury the precise issue the Court ordered it to *submit* – the Bank's liability for punitive damages. The trial court's error also tainted the jury's determination of the amount of punitive damages, which was the only question the court did submit. The court refused to permit the jury to consider much of the Bank's mitigating evidence, and it allowed Plaintiffs to argue repeatedly that the Bank's attempts to dispute its liability for punitive damages were reprehensible. As a result, the jury returned a grossly excessive punitive damages verdict in a case in which any award of punitive damages would be questionable. The trial court then exacerbated that excessive verdict by an erroneous award of prejudgment interest.

Plaintiffs present no ground on which transfer to this Court is warranted. If, however, the Court retains this case, the Bank respectfully requests that the punitive damages award be reversed and the cause remanded for new trial on the issue of punitive damages including liability and amount, if any. Any amount of punitive damages should be limited to the amount of Plaintiffs' compensatory damages. The trial court also should be instructed to limit the evidence on retrial to conduct related to the Bank's negligence in failing to comply with the work plan, in accordance with *State Farm*. Alternatively, the Bank requests the Court to remit the punitive damages award to not more than the amount of Plaintiffs' compensatory damages. Under either alternative, the Court should vacate the award of prejudgment interest.

Respectfully Submitted,

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April 17, 2006

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that pursuant to Mo. S. Ct. Rule 84.06(c), this brief (1) contains the information required by Mo. S. Ct. Rule 55.03; (2) complies with the limitations in Mo. S. Ct. Rule 84.06(b) and Local Rule 360; and (3) contains 18,780 words, exclusive of the sections exempted by Mo. S. Ct. Rule 84.06(b) and Local Rule 360(c), determined using the word count program in Microsoft Word 2003. The undersigned counsel further certifies that the accompanying floppy disk has been scanned and was found to be free of viruses.

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Gretchen Garrison

CERTIFICATE OF SERVICE

I certify that one hard copy of this brief and one copy on floppy disk, as required by Mo. S. Ct. Rule 84.06(g), were served on each of the counsel identified below by the means identified below, on April 17, 2006.

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